Filed 12/27/04 P. v. Hall CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE, Plaintiff and Respondent, v. ANDREW HOWARD HALL, Defendant and Appellant.	C044698 (Super. Ct. No. 03F035)

A jury convicted defendant Andrew Howard Hall of resisting an executive officer. (Pen. Code, § 69; all unspecified statutory references are to the Penal Code.) The court found the allegations defendant served a prior prison term (§ 667.5, subd. (b)), and sustained three prior serious felony convictions or "strikes" (§ 667, subds. (b)-(i)). The court struck two of the three "strikes" and sentenced defendant to an aggregate term of five years in prison: two years for violation of Penal Code section 69, doubled to four years for the "strike," plus a one-year prior prison term enhancement.

Defendant waived his right to appeal the sentence, but contends the trial court erred in instructing the jury. We disagree and affirm the judgment.

We note that the abstract of judgment is incorrect and direct the trial court to correct it to properly reflect the sentence set forth above.

FACTS AND PROCEEDINGS

Jackie E. met defendant through mutual friends in February 2003 and moved in with him a week later. Drinking was the centerpiece of the relationship and the catalyst for quarrels that resulted in physical abuse during the following three weeks.

After defendant hit Jackie in the face on the way home from a bar in Weaverville, Jackie called her brother Kenneth to pick her up at defendant's residence. When Kenneth arrived, Jackie refused to leave with him so Kenneth called the sheriff.

Trinity County Sheriff's Deputy Mark Potts went to the house and took a statement from Jackie. She told him that defendant had hit her. She admitted she was, at the time of the interview, intoxicated, saying she had "quite a bit" to drink that day, and that her memory was clouded by alcohol.

After speaking to Jackie, Potts and two other deputies found defendant asleep on the living room floor. Defendant was so unresponsive to the police that Potts checked his pulse to make sure he was alive. Once awake, defendant tried to avoid

being put in handcuffs but the officers overpowered him and placed him in handcuffs. Defendant swore at them throughout.

When the officers tried to help defendant sit up, defendant began kicking at them. Although defendant's kicks did not touch anyone, the deputies put him down and held his legs until they could put him in leg restraints. Defendant continued to squirm and swear at the deputies even after they applied the leg restraints. Addressing Jackie's 19-year-old son, defendant said, "What are you looking at? I'm going to kick your ass."

The deputies took defendant to the Trinity County Jail where he was placed in the "detox" cell. Meanwhile, Deputy Potts obtained an emergency protective order at Jackie's request. When Potts attempted to serve defendant at the jail, defendant wadded up his copy, threw it back at Potts, and told him to "shove it up [his] ass."

The information charged defendant with two counts of inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)--counts one and two), one count of making a criminal threat (§ 422--count three), one count of resisting an executive officer (§ 69--count four) and one count of resisting arrest (§ 148, subdivision (a)(1)--count five), a misdemeanor. It also alleged that defendant had three prior serious felony convictions and had served a prior prison term within the last five years (§§ 667, subds. (b)-(i), 667.5, subd. (b)). The trial court dismissed count three during trial pursuant to section 1118.1. The jury convicted defendant of count four, acquitted him of counts two and five, and deadlocked on count

one, which the court dismissed on the prosecutor's motion. Defendant appeals.

DISCUSSION

Defendant argues the trial court made several errors in instructing the jury. Each claim of error relates to defendant's contention he did not use "force or violence" as that term is used in section 69 because he did not touch the deputies. He contends any one of the errors requires reversal. We hold there was no instructional error.

I

Force and Violence

Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

One can violate Section 69 in two ways: "The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.)

The trial court instructed the jury with a modified version of CALJIC No. 7.50 (7th ed. 2003) which reads: "Defendant is

accused in [Count[s] IV] of having violated Section 69 of the Penal Code, a crime.]

"Every person who willfully [and unlawfully] attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his or her duty, is guilty of a violation of Section 69 of Penal Code, a crime.

"The term 'executive officer' includes a [deputy sheriff][.]

"In order to prove this crime, each of the following elements must be proved:

"[1. A person willfully [and unlawfully] attempted to deter or prevent an executive officer from performing any duty imposed upon that officer by law; and

"2. The attempt was accomplished by means of any threat or violence.]

"[1. A person knowingly [and unlawfully] resisted an executive officer in the performance of his or her duty; and

"2. The resistance was accomplished by means of force or violence.]"

The defendant did not request modification of CALJIC No. 7.50. Nor did he request an instruction on the definition of "force or violence" using CALJIC No. 16.141.

On appeal, defendant contends the trial court erred in submitting count four to the jury on both methods of violating

section 69 "because the undisputed evidence showed that [defendant] did not use the required force or violence" in resisting arrest. He argues that "the undisputed testimony of the deputies made clear that [defendant] did not apply physical force; he did not touch them. Rather, he merely passively resisted the deputies by tucking his hands under his own body and then, when forced by the officers into a sitting position, he tried unsuccessfully to kick them before being restrained." Defendant insists that as a matter of law, his conduct did not amount to "resisting by force or violence," the second type of section 69 violation. There is no merit in this argument.

First, there is nothing in the plain language of section 69 to suggest the Legislature intended to require a "touching" or "battery" of the person to establish "resist[ance], by force or violence." The prohibited act is resisting an executive officer from performing the officer's duties through the use of force or violent conduct. (See *People v. Hines* (1997) 15 Cal.4th 997, 1061.) "Violence" is "[t]he exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this; treatment or usage tending to cause bodily injury . . . ." ("[V]iolence, n." *Oxford English Dict.* (2d ed. 1989) *OED Online* Oxford University Press at <http://dictionary.oed.com/cgi/entry/00277885> [as of Oct. 25, 2004].)

By kicking at the officers as they attempted to arrest him, defendant was using physical force so as to inflict on, or tend to cause bodily injury to, the officers when they came within

range of his legs. He did not touch them though he obviously meant to do so. That he was unsuccessful in his attempts to kick them does not result in a lesser crime. His acts were violent and, thus, sufficient to satisfy the "force or violence" requirement of the statute. There was no need to instruct further given the commonly understood meaning of the words.

Defendant relies, in part, on a use note that follows the text of CALJIC No. 7.50 (7th ed. 2003) at page 299. The use note reads: "'Force or violence,' as used in the law of battery, is defined in CALJIC 16.141." (*Ibid.*) From this reference, defendant engrafts on section 69 the definition of force or violence as used in the law of battery. Defendant reads too much into the use note. It means merely that, in an appropriate case where, factually, there has been a battery, the trial court *may* use the definition of force or violence set forth in CALJIC No. 16.141, not that the court *must* when the facts do not support its use. The use note does not define the crime. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 756 [contrary to use note, the court is not required to instruct the jury on the elements of the specific crime threatened in violation of § 422].)

Defendant also cites *People v. Lozano* (1987) 192 Cal.App.3d 618 (*Lozano*) in support of his argument that under section 69 "force or violence" requires a touching. In that case, the defendant hit a jail guard in the face and broke his radio in an attempt to escape from a minimum-security facility in Milpitas. The jury found him guilty of escape in violation of section

4532, subdivision (a) and found true the allegation the escape was by force and violence. (*Id.* at pp. 620-621.) On appeal, the *Lozano* court held that, "where an escapee's force or violence is directed against a person, it is synonymous with the crime of battery as defined in section 242 . . . ." (*Id.* at p. 627.) Thus, it concluded the trial court did not err in instructing the jury with CALJIC No. 16.141, which described "force or violence" for purposes of battery. (*Id.* at p. 628.)

Lozano does not aid defendant. In *Lozano*, the facts showed that, indisputably, defendant committed a battery on the officer while trying to escape. Under those circumstances the court held only that CALJIC No. 16.141 appropriately defined the particular force and violence at issue in that case. *Lozano* did not hold that CALJIC No. 16.141 sets forth the definition of force or violence in every case.

II

Further Instructions

Based on the foregoing analysis, we reject defendant's claim he was denied due process because the trial court failed to instruct the jury with CALJIC No. 16.141. For the same reasons, we also reject defendant's argument that "force or violence" as used in section 69 has a special legal meaning, "which requires definition to ensure a reliable jury determination" to distinguish a felony violation of section 69 from a misdemeanor violation of section 148.

Section 148, subdivision (a), reads in part: "Every person who willfully resists, delays, or obstructs any public officer,

peace officer, or an emergency medical technician . . . , in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

We have explained that under section 69, "force or violence" may or may not involve a touching. It is undisputed there was no touching in this case. Accordingly, we conclude the trial court was not required to instruct sua sponte on the definition of "force or violence" relating to battery as set forth in CALJIC No. 16.141. The commonly understood term "force or violence" as used in section 69 is sufficient to distinguish the matter from the provisions of section 148.

III

Lesser Included Offense

The prosecutor explained in closing argument that count four, the alleged violation of section 69, pertained to defendant's conduct when the sheriffs' deputies attempted to arrest him at his residence. Count five, the alleged violation of section 148, involved defendant's conduct at the jail when Deputy Potts attempted to serve the emergency restraining order. The trial court denied defendant's earlier request to instruct on section 148 as a lesser included offense of section 69 in count four on grounds it was "not a true lesser and not appropriate in this case." Defendant contends this was prejudicial error. He does not dispute that he resisted arrest

--only that his resistance was forcible. On this theory, defendant "has consistently maintained that his resistance only violated section 148 and not section 69." We conclude there was no error.

In criminal cases, trial courts must instruct the jury on the general principles of law relevant to the issues raised by the evidence, even in the absence of a request. "That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) The Supreme Court emphasized that "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.)

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also

committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117.) *People v. Belmares* (2003) 106 Cal.App.4th 19, 24, holds that "resisting" under section 148 is not a lesser included offense of "deterring" under section 69 based on the statutory elements test.

Defendant cites *People v. Wright* (1996) 52 Cal.App.4th 203, 209-210, and argues that the court was "required to instruct on simple resisting as a lesser included offense of forcible resisting under the accusatory pleading test because the section 69 offense was charged conjunctively." He contends that "[t]he undisputed absence of any touching clearly raises the question whether all the elements of the second type of section 69 offense were proven, requiring instruction on section 148."

As we explained, defendant satisfied the "force or violence" element of resisting an executive officer under the second prong section 69 by kicking at the sheriff's deputies who attempted to arrest him. It is therefore irrelevant whether section 148 is a lesser included offense of section 69. Thus, the trial court was correct in ruling the requested instruction "not appropriate in this case" because the evidence showed that "all of the elements of the charged offense were present" and there was "no evidence that the offense was less than that charged." (*Breverman, supra,* 19 Cal.4th at p. 154.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect the trial court's

imposition of a five-year sentence consisting of the middle term of two years for violating section 69, doubled for the strike, plus a one-year enhancement under section 667.5, subdivision (b), and to forward the corrected abstract to the Department of Corrections.

HULL, J.

We concur:

NICHOLSON, Acting P.J.

MORRISON, J.